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Constitutional Rules of Community Law in EEC Competition Cases

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Abstract

Part I of this paper seeks to investigate the possible bias, or difference in usage, in the use of the word “constitutional” with particular reference to the now resolved tension between the Court of Justice of the European Communities and the German Constitutional Court. Part II discusses some landmark cases in which the European Courts had to decide whether the powers of the Commission of the European Communities in competition investigations are limited by “constitutional” rules. Part III discusses the Court’s use of the general principles of legal certainty, legitimate expectation, and proportionality to resolve problems of interpretation and application in competition law.

ARTICLES

CONSTITUTIONAL RULES OF COMMUNITY LAW IN EEC COMPETITION CASES†

David Edward*

INTRODUCTION

The title of this paper was proposed by the organizers of the 1989 Fordham Corporate Law Institute Conference where it was first delivered. But, as one of them confessed, "The use of the word 'constitutional' may be attributable to an Anglo-Saxon bias, or even a specifically American bias." Is there a bias, or at least a difference in usage, that reflects significant differences between Community law and American law?

Part I of this paper seeks to answer that question with particular reference to the now resolved tension between the Court of Justice of the European Communities (the "European Court" or the "Court") and the German Constitutional Court. Part II discusses some landmark cases in which the European Court had to decide whether the powers of the Commission of the European Communities (the "Commission") in competition investigations are limited by "constitutional" rules. These cases are: *National Panasonic v. Commission*,¹ *A M & S v. Commission*,² and the group of very recent cases decided in September and October of 1989, *Hoechst v. Commission*,³ *Dow Chemical Ibérica v. Commission* ("Dow"),⁴ *Orkem (previously CdF Chimie) v. Com-*

† A version of this Article will be published in 1989 FORDHAM CORP. L. INST. (B. Hawk ed. 1990). Copyright © Transnational Publications, Inc., 1990.

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1. Case 136/79, 1980 E.C.R. 2033, Common Mkt. Rep. (CCH) ¶ 8682.

2. Case 155/79, 1982 E.C.R. 1575, Common Mkt. Rep. (CCH) ¶ 8757.

3. Joined Cases 46/87 & 227/88 (Judgment of Sept. 21, 1989), 1989 E.C.R. ____.

For previous unsuccessful interlocutory proceedings, see Case 46/87R, [1988] 4 Common Mkt. L.R. 430.

4. Joined Cases 97-99/87 (Judgment of Oct. 17, 1989), 1989 E.C.R. ____.

mission,⁵ and *Solvay v. Commission*.⁶ Part III discusses the Court's use of the general principles of legal certainty, legitimate expectation, and proportionality to resolve problems of interpretation and application in competition law. This paper does not attempt to deal comprehensively with the numerous competition cases in which questions of due process (or rights of defense) have been raised.⁷

I. "CONSTITUTIONAL RULES" IN THE COMMUNITY'S LEGAL ORDER

Some European lawyers, and certainly some European politicians, would refuse to accept the word "constitutional" as part of the vocabulary of Community law. They would insist, perhaps rightly, on the importance of the distinction between treaty law and constitutional law. Those who would be prepared to describe the Community treaties (the "Treaties")⁸ as being in some sense the constitution of the Community would probably use the expression "constitutional rules" to refer to the parts of the Treaties that deal with the classical preoccupation of federal constitutions: the creation of the three Communities, the merger of their institutions, and the allocation and separation of powers between those institutions and also between the Communities and the Member States.

Where the Community Treaties create individual rights, they do so in the context of their economic objectives. Their self-standing, entrenched provisions are essentially concerned with economic prescription. As Jean Monnet is said to have remarked, "the whole treaty is about competition." There is nothing in the Treaties to compare with the catalogue of indi-

5. Case 374/87 (Judgment of Oct. 18, 1989), 1989 E.C.R. —.

6. Case 27/88 (Judgment of Oct. 18, 1989), 1989 E.C.R. —.

7. A full discussion and comprehensive bibliography can be found in A. PLIAKOS, *LES DROITS DE LA DÉFENSE ET LE DROIT COMMUNAUTAIRE DE LA CONCURRENCE* 441 (Bruylant 1987). For a discussion of the rights of defense in competition cases before the Commission, see C.S. KERSE, *E.E.C. ANTITRUST PROCEDURE* 115-39 (2d ed. 1988). Recent cases in which such issues have been raised unsuccessfully include: *British Leyland v. Commission*, Case 226/84, 1986 E.C.R. 3263, *Common Mkt. Rep.* (CCH) ¶ 14,336 and *BAT and Reynolds v. Commission*, Cases 142 & 156/84, 1987 E.C.R. 4487, *Common Mkt. Rep.* (CCH) ¶ 14,405.

8. The European Communities were founded upon three treaties: Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951; Treaty Establishing the European Economic Community, Mar. 25, 1957 [hereinafter EEC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957.

vidual rights set out in the U.S. Bill of Rights. For such a catalogue, a Community lawyer would look to the European Convention on Human Rights (the "European Convention" or the "Convention")⁹ and the national constitutions of the Member States.

By contrast, although the commerce clause of the U.S. Constitution has been described as the mechanism by which the Supreme Court strives to maintain a working federalism, an American lawyer would not expect to look in the Constitution for details of the way in which his legal system gives effect to the commerce clause. The U.S. Constitution is less specific in prescribing economic objectives than Article 3 of the European Economic Community (the "EEC") Treaty,¹⁰ let alone Articles 85 and 86. In some respects this may not matter because to an outside observer of the American legal system, it sometimes seems that the Sherman Act¹¹ has acquired a constitutional, if not mystical, significance. Nevertheless, were there to be a direct conflict between the Bill of Rights and the enforcement of antitrust law, the Bill of Rights would prevail.

The same result does not follow as easily in Community law. Indeed, at one stage, the lack of a legally binding catalogue of fundamental rights gave rise to a potentially serious—and truly "constitutional"—conflict between the European Court and the German Federal Constitutional Court. In response to a reference from a German administrative court, the European Court held that

the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure. . . . The protection of [fundamental] rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.¹²

9. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*].

10. EEC Treaty, *supra* note 8, art. 3.

11. 15 U.S.C. §§ 1-7 (1988).

12. *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, 1970 E.C.R. 1125, 1134, ¶¶ 3-4, *Common Mkt. Rep. (CCH)* ¶ 8126, at 7424-7425.

The German administrative court then asked the Constitutional Court whether the law, as declared by the European Court, was compatible with the German Constitution. The Constitutional Court held that, on the facts of the case, there was no incompatibility. But the Court roundly declared that, in the event of conflict between Community law and the guarantee of fundamental rights in the German Constitution, "the guarantee of fundamental rights in the Constitution prevails so long as [*solange*] the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism."¹³

This *Solange* decision¹⁴ generated much heated debate and led, more or less directly, to a report on *The Protection of Fundamental Rights in the Community* presented by the Commission to the European Parliament and to the Council of Ministers of the European Communities (the "Council") in 1976,¹⁵ and thereafter to a Commission memorandum proposing *Accession of the Communities to the European Convention on Human Rights* in 1979.¹⁶

For various reasons (including, it is said, a forcefully expressed adverse report by the British House of Lords' Select Committee)¹⁷ the Commission's proposal was taken no further. Meanwhile, in its *Vielleicht* decision,¹⁸ the German Constitutional Court had softened its position, recognizing that "[t]he legal order of the Member States and the legal order of the Community do not stand side by side starkly and in isolation; they are in many ways geared to one another, intertwined with one another and exposed to reciprocal influences."¹⁹

Although it was not mentioned at that stage by either the European Court or the German Constitutional Court, a serious underlying problem had been that, until 1974, France had not

13. *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide* ("Solange I"), Case 2 BvL 52/71, 37 Bundesverfassungsgericht [BVerfGE] 271, 281, [1974] 2 Common Mkt. L.R. 540, 551, ¶ 24.

14. *Id.*

15. BULL. EUR. COMM. Supp. No. 5 (1976).

16. BULL. EUR. COMM. Supp. No. 2 (1979).

17. Select Committee on the European Communities: Human Rights, H.L. 1979-80 Sess., 71st Rep., ¶¶ 22-43 (1980).

18. *Fa. Steinike und Weinlig v. Bundesamt für Ernährung und Forstwirtschaft* ("Vielleicht"), Case 2 BvR 6/77, 52 BVerfGE 187, 200, [1980] 2 Common Mkt. L.R. 531, 535, ¶ 4.

19. *Id.* at 200, [1980] 2 Common Mkt. L.R. at 535, ¶ 4.

ratified the European Convention. Further, although France then ratified the Convention and recognized the compulsory jurisdiction of the European Court of Human Rights,²⁰ France did not become fully part of the Convention system until 1981, when it recognized the right of individual petition to the European Commission of Human Rights.²¹ It was therefore inevitable during the 1960s and 1970s that the European Court should be cautious in its approach to the Convention as a source of law and, correspondingly, that the German Constitutional Court should have looked for a separate Community catalogue of enforceable rights. The European Court has never referred to the existence of this problem, but the reality of the earlier German concern about the French position was made explicit in the *Mittlerweile* (or *Solange II*) judgment²² of the German Constitutional Court in 1986.

The issue in *Solange II* was essentially procedural, but the underlying question was whether the German Constitutional Court could be called upon to determine the constitutionality of Community legislation which had formed the basis of disputed acts on the part of German public authorities. The German Constitutional Court declared itself satisfied that

a measure of protection of fundamental rights has been established . . . within the sovereign jurisdiction of the European Communities which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided for in the Constitution. All the main institutions of the Community have since acknowledged in a legally significant manner that in the exercise of their powers and the pursuit of the objectives of the Community they will be guided as a legal duty by respect for fundamental rights, in particular as established by the *constitutions of member-States and by the European Convention on Human Rights*. There are no decisive factors to lead one to conclude that the standard of fundamental rights which has been achieved under Community law is not adequately consolidated and is only of a transitory nature. This standard of fundamental rights has in the meantime, particularly through the decisions of the European Court,

20. European Convention, *supra* note 9, arts. 45, 48, 213 U.N.T.S. 221, 246.

21. *Id.* art. 25(1), 213 U.N.T.S. at 236-38.

22. *Re Wünsche Handelsgesellschaft* ("Solange II" or "Mittlerweile"), Case 2 BvR 197/83, 73 BVerfGE 339, [1987] 3 Common Mkt. L.R. 225.

been formulated in content, consolidated and adequately guaranteed.²³

The judgment then went on to trace the development of the case law of the European Court. This decision deserves to be cited at length, not only as a useful summary of the case law but also, and more importantly for present purposes, because it identifies the legal rules which the Constitutional Court of the most populous Member State classifies as "constitutional rules."²⁴

In the early years the European Court refused to investigate accusations by parties that decisions of the High Authority had infringed principles of German constitutional law and in particular Articles 2 and 12 of the Constitution;²⁴ it stated that it had no authority to ensure respect for rules of internal law in force in one or other Member State, even if they involved principles of constitutional law, and explained that "Community law as it arises under the European Coal and Steel Community Treaty does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights."²⁵ In the following period the European Court made it clear that the general principles of Community law, the maintenance of which it was bound to protect, included the fundamental rights of the individual.²⁶ It is true that in the *Internationale Handelsgesellschaft* case²⁷ it held that the validity of a Community measure or its effect within a particular member-State could not be affected by an allegation that it ran counter to fundamental rights as formulated by the constitution of the member State or to the principles of its constitutional structure; [but the Court] would still have to consider however whether an analogous guarantee under Community law had been disregarded, for the safeguarding of fundamental rights formed

23. *Id.* at 378, [1987] 3 Common Mkt. L.R. at 259, ¶¶ 35-36 (emphasis in original).

* *Infra* notes 24-27, 30, 32-38, 40-41 have been amended to conform to this journal's citation style.

24. *Stork v. High Authority*, Case 1/58, 1959 E.C.R. 17, 26.

25. *Geitling v. High Authority*, Joined Cases 36-38 & 40/59, 1960 E.C.R. 423, 439.

26. *See Stauder v. Ulm*, Case 29/69, 1969 E.C.R. 419, 425, Common Mkt. Rep. (CCH) ¶ 8077, at 8118.

27. *Internationale Handelsgesellschaft*, Case 11/70, 1970 E.C.R. 1125, Common Mkt. Rep. (CCH) ¶ 8126.

part of the general principles of law which the Court had to protect.²⁸ Whilst the protection of such rights must be supported by the constitutional traditions of the member-States they must also operate within the structure and objectives of the Community.²⁹

The European Court took the essential step (from the viewpoint of the [German] Constitution) in its judgment in the *Nold* case³⁰ where it stated that in relation to the safeguarding of fundamental rights it had to start from the common constitutional traditions of the member-States: "it cannot therefore allow measures which are incompatible with fundamental rights recognised and guaranteed by the constitutions of those States."³¹

On the legal basis of the general principles of Community law thus defined and given that content, the European Court in the period that followed cited fundamental rights as recognised in the constitutions of member States as obligatory standards for reviewing measures of Community organs taken within their spheres of jurisdiction. Side by side with the *express guarantees of liberties contained in the Community Treaties themselves*³² the foreground was occupied naturally by the *fundamental rights and freedoms relating to economic activities, such as the right to property and freedom to pursue economic activities*.³³ In addition to that it cited *other basic rights, such as freedom of association, the general principle of equal treatment and the prohibition on arbitrary acts, religious freedom or the protection of the family, as standards of assessment*.³⁴

28. *Id.* at 1134, Common Mkt. Rep. (CCH) ¶ 8126, at 7424-7425 (footnote added).

29. *Id.* (footnote added).

30. *Nold v. Commission*, Case 4/73, 1974 E.C.R. 491.

31. *Id.* at 507 (footnote added).

32. *See, e.g.*, EEC Treaty, *supra* note 8, arts. 7, 48 *et seq.*, 59 *et seq.*, 67 *et seq.* (emphasis added).

33. *See* *SAVMA v. Commission*, Case 264/81, 1984 E.C.R. 3915, Common Mkt. Rep. (CCH) ¶ 14,149; *Agricola Commerciale Olio v. Commission*, Case 232/81, 1984 E.C.R. 3881, Common Mkt. Rep. (CCH) ¶ 14,148; *Hauer v. Land Rheinland-Pfalz*, Case 44/79, 1979 E.C.R. 3727, Common Mkt. Rep. (CCH) ¶ 8629; *Nold v. Commission*, Case 4/73, 1974 E.C.R. 491, 507 (emphasis added).

34. *See* *Diatta v. Land Berlin*, Case 267/83, 1985 E.C.R. 567, Common Mkt. Rep. (CCH) ¶ 14,169; *Michel v. Commission*, Case 273/83, 1985 E.C.R. 354; *Samara v. Commission*, Case 266/83, 1985 E.C.R. 196; *Kupferberg v. Hauptzollamt Mainz* ("Kupferberg II"), Case 253/83, 1985 E.C.R. 166, Common Mkt. Rep. (CCH) ¶ 14,175; *Finsider v. Commission*, Case 250/83, 1985 E.C.R. 142; *Biovilac v. EEC*, Case 59/83, 1984 E.C.R. 4057, Common Mkt. Rep. (CCH) ¶ 14,150; *Defrenne v. Sabena*, Case 149/77, 1978 E.C.R. 1365, Common Mkt. Rep. (CCH) ¶ 8500; *Ruck-*

The European Court has generally recognised and consistently applied in its decisions the principles, which follow from the rule of law, of the *prohibition of excessive action* and of *proportionality* as general legal principles in reaching a balance between the common-interest objectives of the Community legal system and safeguarding of the essential content of fundamental rights.³⁵ It has recognised the *prohibition of retrospection* as an emanation of the *basic principle of legal certainty* and has recognised the *rule against double penalties*³⁶ and likewise the *obligation under the rule of law to state reasons for individual decisions*.³⁷ In *Johnston v. The Chief Constable of the Royal Ulster Constabulary*³⁸ the [European] Court, having recourse to the constitutional traditions of all the member-States and to **Article 13** of the European Human Rights Convention, categorised the claim to *effective judicial protection for the safeguarding of personal rights* as a constituent part of the guarantees for fundamental rights under Community law.³⁹ It regarded the *duty to grant a legal hearing* as an essential requirement of a fair procedural system.⁴⁰

For the purposes of defining under Community law the

deschel v. Hauptzollamt Hamburg-St. Annen, Joined Cases 117/76 & 16/77, 1977 E.C.R. 1753, Common Mkt. Rep. (CCH) ¶ 8457; Prais v. Council, Case 130/75, 1976 E.C.R. 1589; Union Syndicale, Massa and Kortner v. Council, Case 175/73, 1974 E.C.R. 917 (emphasis added).

35. More recent examples are the judgments in: *Procureur de la République v. ADBHU*, Case 240/83, 1985 E.C.R. 531, Common Mkt. Rep. (CCH) ¶ 14,164; *Fearon v. Irish Land Commission*, Case 182/83, 1984 E.C.R. 3677, Common Mkt. Rep. (CCH) ¶ 14,126; *Heijn*, Case 94/83, 1984 E.C.R. 3263, Common Mkt. Rep. (CCH) ¶ 14,120; *National Panasonic v. Commission*, Case 136/79, 1980 E.C.R. 2033, Common Mkt. Rep. (CCH) ¶ 8682; *Testa v. Bundesanstalt für Arbeit*, Joined Cases 41, 121 & 796/79, 1980 E.C.R. 1979; *Hauer v. Land Rheinland-Pfalz*, Case 44/79, 1979 E.C.R. 3727, Common Mkt. Rep. (CCH) ¶ 8629; *Internationale Handelsgesellschaft*, Case 11/70, 1970 E.C.R. 1125, Common Mkt. Rep. (CCH) ¶ 8126; cf. M. Hilf, in 1985 EUROPÄISCHE GRUNDRECHT ZEITSCHRIFT [EuGRZ] 647, 649 (emphasis added).

36. See *Regina v. Kirk*, Case 63/83, 1984 E.C.R. 2689, 2718, Common Mkt. Rep. (CCH) ¶ 14,070, at 14,973; *Racke v. Hauptzollamt Mainz*, Case 98/78, 1979 E.C.R. 69, 86, Common Mkt. Rep. (CCH) ¶ 8541, at 7761; *Boehringer v. Commission*, Case 7/72, 1972 E.C.R. 1281, 1290, Common Mkt. Rep. (CCH) ¶ 8191, at 8575 (emphasis added).

37. *Netherlands and Leeuwarder Papierwarenfabriek v. Commission*, Joined Cases 296 & 318/82, 1985 E.C.R. 809, Common Mkt. Rep. (CCH) ¶ 14,170; *Intermills v. Commission*, Case 323/82, 1984 E.C.R. 3809, Common Mkt. Rep. (CCH) ¶ 14,154; cf. M. Hilf, in 1985 EuGRZ, at 650 (emphasis added).

38. Case 222/84, 1986 E.C.R. 1651; Common Mkt. Rep. (CCH) ¶ 14,304.

39. *Id.* at 1682, ¶ 17, Common Mkt. Rep. (CCH) ¶ 14,304, at 16,887 (footnote added) (emphasis added).

40. See *National Panasonic*, Case 136/79, 1980 E.C.R. 2033, 2058, Common Mkt.

content and extent of fundamental rights the [European] Court has also referred to the European Human Rights Convention and its additional protocol⁴¹

Compared with the standard of fundamental rights under the [German] Constitution it may be that the guarantees for the protection of such rights established thus far by the decisions of the European Court, since they have naturally been developed case by case, still contain gaps in so far as specific legal principles recognised by the Constitution or the nature, content or extent of a fundamental right have not individually been the object of a judgment delivered by the Court. What is decisive nevertheless is the attitude of principle which the Court maintains at this stage towards the Community's obligations in respect of fundamental rights, to the . . . rules and the legal connection of that law (to that extent) with the constitutions of member-States and with the European Human Rights Convention, as is also the practical significance which has been achieved by the protection of fundamental rights in the meantime in the Court's application of Community law.⁴²

Any remaining doubt as to whether national constitutional traditions and the European Convention can be treated as a *direct* source of Community law seems to have been removed by the Single European Act,⁴³ also signed (but not fully ratified) in 1986, the preamble of which refers to "the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."⁴⁴

So, in October 1987, after the Single European Act came into force, the European Court was able to refer unreservedly to the European Convention as a source of law in terms that differ slightly but significantly from those of a comparable dic-

Rep. (CCH) ¶ 8682, at 8067; *Pecastaing v. Belgium*, Case 98/79, 1980 E.C.R. 691, Common Mkt. Rep. (CCH) ¶ 8654 (emphasis added).

41. See *Johnston*, 1986 E.C.R. at 1682, Common Mkt. Rep. (CCH) ¶ 14,304, at 16,887; *Rutili v. Minister for the Interior*, Case 36/75, 1975 E.C.R. 1219, 1232, Common Mkt. Rep. (CCH) ¶ 8322, at 7778.

42. *Solange II*, Case 2 BvR 197/83, 73 BVerfGE 339, 378-81, [1987] 3 Common Mkt. L.R. 225, 259-62, ¶¶ 37-41, 44 (emphasis added).

43. O.J. L 169/1 (1987), Common Mkt. Rep. (CCH) ¶ 21,000.

44. *Id.* preamble, at 2-3, Common Mkt. Rep. (CCH) ¶ 21,000, at 9601.

tum a year earlier.⁴⁵

In its analysis of the European case law, the German Constitutional Court identified several different types of rules that had been adopted by the European Court "as obligatory standards for reviewing measures of Community organs taken within their spheres of jurisdiction."⁴⁶ Those rules were:

- (i) the "express guarantees of liberties contained in the Community Treaties themselves."⁴⁷
- (ii) the "fundamental rights and freedoms relating to economic activities" (*e.g.*, the right to property; freedom to pursue economic activity);⁴⁸
- (iii) "other basic rights" (*e.g.*, freedom of association; equal treatment; protection against arbitrary treatment; religious freedom; protection of the family);⁴⁹
- (iv) general legal principles which follow from the rule of law:
 - (a) principles applied in such a way as to strike a balance between the general interest and individual rights (*e.g.*, prohibition of excessive action; proportionality);⁵⁰
 - (b) "principles deriving from the basic principle of legal certainty" (*e.g.*, prohibition of retrospection or retroactive rule-making);⁵¹
 - (c) "the rule against double penalties" (*ne bis in idem*);⁵²
 - (d) "the obligation . . . to state reasons for individual decisions";⁵³
 - (e) the right "to effective judicial protection for personal rights";⁵⁴
 - (f) the right to a fair procedural system, including the

45. Compare UNCTEF (Union of Football Trainers) v. Heylens, Case 222/86, 1987 E.C.R. 4097, 4117, ¶ 14 (holding judicial remedy essential when national authorities deny individual rights regarded as fundamental under EEC Treaty) with Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84, 1986 E.C.R. 1651, 1682, ¶ 18, Common Mkt. Rep. (CCH) ¶ 14,304, at 16,887 (recognizing principles of Convention must be taken into consideration in interpreting Community law).

46. *Solange II*, 73 BVerfGE at 379-80, [1987] 3 Common Mkt. L.R. at 260, ¶ 39.

47. *Id.* at 380, [1987] 3 Common Mkt. L.R. at 260, ¶ 39 (footnote omitted).

48. *Id.* (footnote omitted).

49. *Id.*

50. *Id.* at 380, [1987] 3 Common Mkt. L.R. at 260, ¶ 40.

51. *Id.* at 380-81, [1987] 3 Common Mkt. L.R. at 260-61, ¶ 40.

52. *Id.* at 381, [1987] 3 Common Mkt. L.R. at 260, ¶ 40 (footnote omitted).

53. *Id.* (footnote omitted).

54. *Id.*

right to be heard.⁵⁵

There are, of course, other ways in which the rules and principles applied by the European Court could have been classified. What is significant for present purposes is the way in which the German Constitutional Court has brought together such a range of rules in a single comprehensive (but not exhaustive) inventory, characterizing them as "obligatory standards" for the assessment of administrative action.⁵⁶ This inventory includes, but goes well beyond, the conventional catalogue of individual rights to be found in national constitutions and international conventions. It extends to embrace principles developed particularly in German administrative law and adopted by the European Court as a legally and morally acceptable basis on which to resolve the conflict, inevitable in any modern democratic society, between the general interest and individual claims of right. These include the right to judicial protection, the duty to state reasons, legal certainty, legitimate expectation, and proportionality which have become central concepts in the Community legal order.⁵⁷

So, at a simple level, there really cannot be much doubt that there are "constitutional rules" in the Community legal order. On the one hand, the European Court looks to national constitutions as a source of applicable legal principles; on the other, the German Constitutional Court has accepted that the European Court's approach and case law are compatible with the German Constitution. In that sense we are clearly dealing with "constitutional" issues.

Nevertheless, it may appear to American lawyers that the rules to which a Community lawyer would attach the most importance are rather different from those which they would themselves describe as "constitutional rules." There are perhaps four reasons why this is so. First, Community law affects only tangentially, if at all, those areas of law where questions of fundamental *human* rights are most likely to arise—criminal law, criminal procedure, law enforcement, family law, and the law of property. Second, the legal systems of the Member

55. *Id.*

56. *Id.* at 379-80, [1987] 3 Common Mkt. L.R. at 260, ¶ 39.

57. For a discussion of the principles of legal certainty, legitimate expectation, and proportionality, see *infra* notes 153-205 and accompanying text.

States differ substantially in their procedures and, consequently, in the way in which they give effect to fundamental rights such as due process. Third, the "subjects" of Community law are generally economic operators and are more likely to be "legal persons" (*e.g.*, corporations) than "natural persons" (human beings). The approach of the Member States on conferring "human" rights on legal persons is not uniform, nor even always consistent within the same state. Fourth, the European Parliament is in no position to exercise the sort of democratic control that the U.S. Congress regularly and forcefully exerts over the executive branch. This places an additional responsibility on the European Court.

So, on the whole, the general principles or "constitutional rules" of greatest day-to-day significance in Community law are those which the Court uses to strike, and sometimes adjust, the balance between the concern of the administrator to secure the economic objectives of the Treaties and the concern of the *administré* to know where he stands and to receive fair treatment. It has to be remembered throughout, that the European Court is not a supreme court of general jurisdiction but a creature of the Treaties whose law it exists to apply.⁵⁸ While its duty is to "ensure that . . . the law is observed,"⁵⁹ it cannot invent new remedies, its jurisdiction being limited to the forms of action provided by the Treaties.⁶⁰ The Court's room to manoeuvre is provided by Article 173 of the EEC Treaty, which empowers the Court to annul an administrative decision "on grounds of lack of competence, *infringement of an essential procedural requirement*, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers."⁶¹

58. See EEC Treaty, *supra* note 8, arts. 164-88; Protocol on the Statute of the Court of Justice of the European Economic Community, Apr. 17, 1957. The Court's powers include direct review of Community action pursuant to Article 173 of the EEC Treaty and indirect control through cases referred to the European Court for decision of a point of EC law by the national courts under Article 177 of the same treaty. However, the Court's jurisdiction is not defined exclusively by the Treaties, but also by provisions in other agreements, conventions, and protocols. See K.P.E. LASOK, *THE EUROPEAN COURT OF JUSTICE* 3 (1984).

59. EEC Treaty, *supra* note 8, art. 164.

60. See, *e.g.*, *id.* arts. 169, 170, 173, 175, 177-82.

61. *Id.* art. 173 (emphasis added).

II. COMPETITION INVESTIGATIONS AND THE POWERS OF THE COMMISSION

The starting point for discussion of the landmark competition cases in which the Court examined "constitutional" rules is the basic Competition Regulation (17/62) ("Regulation 17" or the "Regulation").⁶² Regulation 17 confers on the Commission expressly and in unqualified terms extensive powers to request information,⁶³ to conduct inquiries,⁶⁴ and to undertake investigations.⁶⁵ When the draft Regulation was before the European Parliament, the Internal Market Committee, for which Dr. Arved Deringer was Rapporteur, pointed out that in defining the Commission's powers the Commission's proposal failed to take account of "general principles applied in a state based on the rule of law."⁶⁶ But the Regulation was enacted without amendment in this respect. The draft Regulation provided for the right to be heard in certain cases, and the text of what became article 19 of the Regulation was improved in light of the Deringer Report, but it does not provide for any right to be heard *before* the Commission embarks on inquiries or investigations.⁶⁷

Thus there is, on the one hand, a Community text that confers wide powers of inquiry and investigation upon the Commission in virtually unqualified terms and that confers the right to be heard only in certain circumstances. On the other hand, there is no text that expressly limits the scope or exercise of the Commission's powers by reference to fundamental, human, or "constitutional" rights. If a limit is to be placed on the Commission's powers, the Court must find it in the "common law" of the Community.

62. Council Regulation No. 17, 5 J.O. 204/62, O.J. Eng. Spec. Ed. 1959-62, at 87, Common Mkt. Rep. (CCH) ¶ 2401 [hereinafter Regulation 17].

63. *Id.* art. 11, 5 J.O. at 208/62, O.J. Eng. Spec. Ed. 1959-62, at 90, Common Mkt. Rep. (CCH) ¶ 2501, at 1759-1760.

64. *Id.* art. 12, 5 J.O. at 208/62, O.J. Eng. Spec. Ed. 1959-62, at 90, Common Mkt. Rep. (CCH) ¶ 2511, at 1762-1767.

65. *Id.* art. 14, 5 J.O. at 209/62, O.J. Eng. Spec. Ed. 1959-62, at 91, Common Mkt. Rep. (CCH) ¶ 2531, at 1767-1771.

66. 1961-1962 PARL. EUR. DOC. (No. 57) 30, ¶ 121 (1961).

67. Regulation 17, *supra* note 62, art. 19, 5 J.O. at 210/62, O.J. Eng. Spec. Ed. 1959-62, at 92, Common Mkt. Rep. (CCH) ¶ 2582, at 1791-1794.

A. *The National Panasonic Case*⁶⁸

During 1979 the Commission, which suspected National Panasonic of operating export bans, ordered an investigation to be carried out at the company's premises in England. The investigation was ordered by a formal decision of the Commission without prior notice to the company, and the Commission's inspectors appeared at the company's premises without warning.⁶⁹ They were asked to wait until the company solicitor arrived but refused to do so. The inspectors then conducted an investigation of the company's files and took away copies of a number of documents, as they were empowered to do.⁷⁰

National Panasonic challenged the Commission's decision on a variety of grounds which, as Advocate General Warner observed "appeared to merge into each other, the essence of the applicant's complaint being that it had had no warning of the investigation."⁷¹

The failure to give prior warning was characterized by National Panasonic as a breach of fundamental rights and of the principle of proportionality. The fundamental rights claimed were the right to privacy,⁷² the right to be heard before an adverse decision is taken,⁷³ and the right to request a stay of such a decision before it is executed.⁷⁴ National Panasonic claimed that the principle of proportionality was violated because the circumstances did not warrant an investigation without warning.⁷⁵

Neither the Advocate General nor the Court seems to have had much difficulty in rejecting these contentions. The oral hearing was on March 18, 1980, the Advocate General delivered his opinion on April 30, 1980, and the Court rendered its judgment on June 26, 1980. In particular, the Court pointed out that the rights guaranteed by article 8 of the Euro-

68. *National Panasonic v. Commission*, Case 136/79, 1980 E.C.R. 2033, Common Mkt. Rep. (CCH) ¶ 8682.

69. *Id.* at 2036, Common Mkt. Rep. (CCH) ¶ 8682, at 8054.

70. *Id.*

71. *Id.* at 2065, Common Mkt. Rep. (CCH) ¶ 8682, at 8072 (Opinion of Advocate General Warner).

72. *Id.* at 2056-57, ¶ 17, Common Mkt. Rep. (CCH) ¶ 8682, at 8067 (referring to the European Convention, *supra* note 9, art. 8, 213 U.N.T.S. 221, 230).

73. *Id.*

74. *Id.*

75. *Id.* at 2059-60, ¶ 28, Common Mkt. Rep. (CCH) ¶ 8682, at 8069.

pean Convention, "in so far as it applies to legal persons" (a significant qualification), are subject to exception where interference with them "is in accordance with the law and is necessary in a democratic society in the interests of . . . the economic well-being of the country, . . . or for the protection of the rights and freedom of others."⁷⁶

Similarly, the Advocate General, referring to the comparative studies undertaken in 1978, pointed out that the right to be heard is subject to exceptions.⁷⁷

The significance of the case for present purposes is that Advocate General Warner drew attention to a feature of Regulation 17 that was to be challenged in the *Hoechst v. Commission*⁷⁸ case seven years later:

What is somewhat unusual about Article 14, if it means what to my mind it does, is that the Commission is empowered to proceed without any sort of warrant from a judicial authority. In general, though not always, the laws of Member States require officers of a public authority to have such a warrant before they may enter private premises. Indeed the Deringer Report suggested, citing the German Constitution, that such a requirement should be written into what are now Articles 11 and 14 of Regulation No. 17.⁷⁹

B. *The A M & S Case*⁸⁰

The *A M & S* case, which started very soon after *National Panasonic*, took considerably longer to argue and to decide. Most unusually, there were two oral hearings and two opinions of two different Advocates-General.⁸¹

A M & S owned a zinc smelter in England. The Commission, exercising its powers under Regulation 17, instituted an

76. *Id.* at 2057, ¶ 19, Common Mkt. Rep. (CCH) ¶ 8682, at 8067.

77. *Id.* at 2068, Common Mkt. Rep. (CCH) ¶ 8682, at 8074 (citing *Due Process in the Administrative Procedure*, 3 PROCEEDINGS OF THE 8TH CONGRESS OF LA FÉDÉRATION INTERNATIONALE POUR LE DROIT EUROPÉEN 1.6-1.7 (1978) [hereinafter 3 FIDE]).

78. Joined Cases 46/87 & 227/88 (Judgment of Sept. 21, 1989), 1989 E.C.R. ____.

79. *Id.* at 2068, Common Mkt. Rep. (CCH) ¶ 8682, at 8074.

80. *A M & S v. Commission*, Case 155/79, 1982 E.C.R. 1575, Common Mkt. Rep. (CCH) ¶ 8757.

81. *Id.* at 1619, Common Mkt. Rep. (CCH) ¶ 8757, at 9062 (Opinion of Advocate General Warner, Jan. 20, 1981); *id.* at 1642, Common Mkt. Rep. (CCH) ¶ 8757, at 9077 (Opinion of Advocate General Slynn, Jan. 26, 1982).

inquiry into competitive conditions in the market for zinc.⁸² In the course of the inquiry, inspectors were sent to the Bristol premises of A M & S with a mandate authorizing them to "verify that there [was] no infringement of Articles 85 and 86 of the EEC Treaty."⁸³ A M & S refused to produce for the inspectors documents which its legal advisers said were covered by legal professional (attorney-client) privilege. The Commission then issued a decision requiring A M & S to produce "all documents for which legal privilege is claimed."⁸⁴ After sundry inconclusive meetings with the Commission, A M & S took the issue to the Court of Justice.

In a sense, the case, as presented to the Court, turned on a question of procedure. Assuming the existence of legal privilege in Community law, how was a claim of privilege to be verified? From a forensic point of view, the Commission was not in a strong position to challenge the principle. Dr. Ehlermann, then Director-General of the Commission's Legal Service, had already expressed the personal view that "there exists a general principle of law, applicable in Community law as part of 'the law' in the sense of Article 164 EEC Treaty . . . which, within certain limits, assures the professional privilege, also in administrative proceedings."⁸⁵

The Commission accepted that it could not *use* privileged documents in order to establish an infringement,⁸⁶ but claimed that only the Commission could decide whether a document was entitled to protection. Furthermore, in order to decide that question, the Commission claimed that its inspectors must be entitled to see the whole document. A M & S, supported by the British government and the CCBE⁸⁷ contended that, if

82. *Id.* at 1579, Common Mkt. Rep. (CCH) ¶ 8757, at 9039.

83. *Id.*

84. *Id.*

85. *Due Process in Administrative Procedure, Community Report* by C.D. Ehlermann and D. Oldekop, in 3 FIDE, *supra* note 77, at 11.6, *quoted in A M & S*, 1982 E.C.R. at 1623, Common Mkt. Rep. (CCH) ¶ 8757, at 9064 (Opinion of Advocate General Warner).

86. Contrary to appearances, the Commission did not rely on a privileged document in the *Quinine* decision. See *Re Cartel in Quinine*, EEC 69/240, 12 J.O. L 192/5 (1969). The opinion ("legal consultation") relied on was already in the public domain in the United States. *Id.* at 19-20, ¶¶ 37-38. Similarly, no privilege could be claimed for the opinion referred to in *Miller v. Commission*, Case 19/77, 1978 E.C.R. 131, 152, ¶ 18 Common Mkt. Rep. (CCH) ¶ 8439, at 7933.

87. La Commission Consultative des Barreaux de la C.E. (the liaison committee

privilege existed, its purpose would be defeated were the Commission able to inspect privileged documents.⁸⁸ Various ways in which the claim of privilege could be decided without the Commission seeing the documents were suggested. Only the French government was prepared to contend that no claim of privilege could be asserted in a competition investigation.⁸⁹

After hearing Advocate General Warner, the Court decided to inspect the documents itself.⁹⁰ Following a procedure that is used in Scotland (and perhaps elsewhere), the documents were sent to the Court in a sealed envelope. The Court then drew up a record of the nature of the documents (without revealing their contents or subject matter) such as "requests for legal advice made by executives of the applicants and sent to a solicitor in private practice in England" or "a letter containing legal advice concerning the law of a third country sent by a firm of solicitors in private practice in that country to a person employed by the applicants' immediate parent in the group" or "a memorandum summarizing legal advice given by a solicitor in private practice in England sent by one executive of the applicants to another."⁹¹ A second oral hearing followed.

After the second oral hearing, Advocate General Slynn concurred with Advocate General Warner in proposing that the whole of the relevant part of the Commission's decision should be declared void.⁹² In what bears all the hallmarks of a compromise decision, the Court took a more cautious approach.

The Court accepted that the confidentiality of communications between lawyer and client is a principle of law common to the Member States and that Regulation 17 must be interpreted and applied in such a way as to give effect to that principle.⁹³ *In dubio*, the Court and not the Commission must decide

for the Bars and Law Societies of the European Community) was allowed to enter the case as an intervener in support of the contentions of A M & S. See *A M & S*, 1982 E.C.R. at 1580, Common Mkt. Rep. (CCH) ¶ 8757, at 9040.

88. *Id.* at 1581, Common Mkt. Rep. (CCH) ¶ 8757, at 9041.

89. *Id.* at 1597, Common Mkt. Rep. (CCH) ¶ 8757, at 9051.

90. *Id.* at 1618-19, Common Mkt. Rep. (CCH) ¶ 8757, at 9055.

91. *Id.* at 1643-44, Common Mkt. Rep. (CCH) ¶ 8757, at 9078 (Opinion of Advocate General Slynn).

92. *Id.* at 1663, Common Mkt. Rep. (CCH) ¶ 8757, at 9090.

93. *Id.* at 1610-11, ¶¶ 18-22, Common Mkt. Rep. (CCH) ¶ 8757, at 9059.

whether the claim of privilege is justified. However, the Court also noted that, while the general principle is common to the Member States, its scope and the criteria for applying it vary. So, application of the principle in Community law must be limited to "such elements . . . as are common to the laws of the Member States."⁹⁴

Effectively, this limited the protection to communications made for the purposes and in the interests of the client's rights of defense, and those emanating from independent lawyers from Community Member States (thus excluding in-house lawyers and lawyers from third countries).

The *A M & S* decision was disappointing in so far as the Court limited itself to the elements common to the laws of all the Member States, which is a more restrained approach than that urged by early doctrinal commentators: that the aim of Community law should be to find the best solution (in qualitative terms), having regard to the spirit, orientation, and general tendency of the national laws,⁹⁵ the best solution being the one in whose direction each legal system is unconsciously moving.⁹⁶

Nevertheless, the decision was a bold one. For the first time the Court struck down a Commission decision that was, on the face of it, fully justified by the express terms of Community legislation, and it did so on the basis of a legal principle which, although common to the Member States, did not appear in any national constitution or in the European Convention. In that sense it marks "the birth of a European common law."⁹⁷

C. *The Hoechst, Dow, Orkem, and Solvay Cases*⁹⁸

On January 15, 1987, the Commission launched its formal inquiry into the thermoplastics industry (PVC and polyethyl-

94. *Id.* at 1611, ¶ 22, Common Mkt. Rep. (CCH) ¶ 8757, at 9059.

95. Reuter, *Le Recours de la Cour de Justice des C.E. à des Principes Généraux de Droit*, in *MÉLANGES OFFERTS À HENRI ROLIN: PROBLÈMES DE DROIT DES GENS* 273 (Pedone 1964).

96. Zweigert, *Les Principes Généraux du Droit des Etats Membres*, in *NOUVELLES: DROIT DES COMMUNAUTÉS EUROPÉENNES* 444-45, ¶¶ 1203-04 (Larcier 1969).

97. *Id.*

98. Orkem (previously *CdF Chimie*) v. Commission, Case 374/87 (Judgment of Oct. 18, 1989), 1989 E.C.R. —; Solvay v. Commission, Case 27/88 (Judgment of Oct. 18, 1989), 1989 E.C.R. —; Dow Chemical Ibérica v. Commission, Joined Cases 97-

ene) by taking a decision authorizing on-the-spot investigations under article 14 of Regulation 17.⁹⁹ Armed with this decision and accompanied by an official of the German Cartel Office (Bundeskartellamt), two Commission officials presented themselves without warning at the premises of Hoechst.¹⁰⁰ Hoechst refused them entry on the ground that they were attempting, contrary to the German Constitution, to carry out a search without judicial warrant.¹⁰¹ Two days later the Commission officials tried again, accompanied by two federal officials and two police officers. Again, they were unsuccessful, as they were on the following day too. The Commission then sent Hoechst a telex requiring the company to submit to investigation under threat of a penalty of 1,000 ECUs a day if they refused. Hoechst did refuse and the Commission took another formal decision imposing that penalty.¹⁰²

The German Federal Cartel Office then applied to the Frankfurt district court for a judicial warrant. This was refused by the district court on the ground that no evidence of any breach of the competition rules had been placed before it.¹⁰³ Hoechst in turn raised an action in the European Court for annulment of the Commission's formal decisions and unsuccessfully sought to have them suspended.¹⁰⁴ Eventually, on March 31, 1987 the Cartel Office was successful in obtaining a judicial warrant from the Frankfurt district court and Hoechst submitted to the investigation two days later. The Commission then took a further decision definitively fixing the amount of the penalty at 55,000 ECUs (55 days at 1,000 ECUs per day).¹⁰⁵

The *Hoechst* case (or strictly speaking, cases) concerned the legality of the Commission's three decisions requiring Hoechst

99/87 (Judgment of Oct. 17, 1989), 1989 E.C.R. __; *Hoechst v. Commission*, Joined Cases 46/87 & 227/88 (Judgment of Sept. 21, 1989), 1989 E.C.R. __.

99. *Hoechst*, at 3-4, ¶ 1 (Judgment); see Regulation 17, *supra* note 62, art. 14, 5 J.O. at 209/62, O.J. Eng. Spec. Ed. 1959-62, at 91, Common Mkt. Rep. (CCH) ¶ 2531, at 1767-1771.

100. *Hoechst*, at 4, ¶ 3 (Judgment); *id.* at 2 (Hearings).

101. *Id.* (Hearings).

102. *Id.* at 4, ¶ 3 (Judgment).

103. *Id.* at 5, ¶ 4.

104. *Id.* ¶ 4.

105. *Id.* ¶ 7.

to submit to investigation, imposing a daily penalty for refusal to do so and definitively fixing the amount of the penalty.

Meanwhile, the Commission was more successful in Spain, where its officials carried out investigations at the premises of Dow Chemical Ibérica, Alcadia, and Empresa Nacional del Petróleo (ENP), being given access to offices, stores, and files and to the attaché case and personal diary of a representative of Dow.¹⁰⁶ With less intervening excitement, these companies also raised actions seeking annulment of the Commission's decision requiring them to submit to an investigation.¹⁰⁷ In their case, the contention was that the decision, or at least the manner of its execution, was a breach of the fundamental right to the inviolability of private premises and respect for private life.¹⁰⁸

The Commission also proceeded against CdF Chimie (which subsequently changed its name to Orkem) in France¹⁰⁹ and against Solvay in Belgium.¹¹⁰ Neither of these companies challenged the decision launching the investigation. However, the Commission subsequently sent each of them requests for information under article 11 of Regulation 17.¹¹¹ Both companies refused to answer certain questions and the Commission then took formal decisions requiring them to do so.¹¹² These decisions were the subject of the *Orkem* and *Solvay* cases, where the main issue, shortly stated, was whether Community law recognizes the privilege against self-incrimination.

Hoechst, *Dow*, and the other two Spanish cases were treated together by Advocate General Mischo who delivered his opinion on February 21, 1989,¹¹³ while *Orkem* and *Solvay* were dealt with by Advocate General Darmon on May 18, 1989.¹¹⁴ How-

106. *Dow Chemical Ibérica v. Commission*, Joined Cases 97-99/87, at 4, ¶ 4 (Judgment of Oct. 18, 1989), 1989 E.C.R. ____.

107. *Id.* at 3, ¶ 1.

108. *Id.* at 5, ¶ 7.

109. *See Orkem* (previously CdF Chimie) v. Commission, Case 374/87, at 3, ¶ 1 (Judgment of Oct. 18, 1989), 1989 E.C.R. ____.

110. *See Solvay v. Commission*, Case 27/88, at 2-3, ¶ 1 (Judgment of Oct. 18, 1989), 1989 E.C.R. ____.

111. *Orkem*, at 3, ¶ 1 (Judgment); *Solvay*, at 2-3, ¶ 1 (Judgment).

112. *Orkem*, at 3, ¶ 1 (Judgment); *Solvay*, at 3, ¶ 2 (Judgment).

113. *Hoechst v. Commission*, Joined Cases 46/87 & 227/88, and *Dow v. Commission*, Joined Cases 97-99/87 ("Hoechst and Dow") (Consolidated Opinion of Advocate General Mischo, Feb. 21, 1989).

114. *Orkem v. Commission*, Case 374/87, and *Solvay v. Commission*, Case 27/

ever, for the purposes of judgment, the cases were treated separately, judgment being given in *Hoechst* on September 21, in *Dow* on October 17, and in *Orkem* and *Solvay* on October 18, 1989.

In many ways it is surprising that the points raised in these cases were not raised before. As already mentioned, Advocate General Warner had, seven years previously in *National Panasonic*, expressed doubts about the Commission's powers of search without judicial warrant.¹¹⁵ It says much for the strength of the Commission's position that, until *Hoechst* did so, no company had taken the crucial but risky step of refusing admission to the Commission's inspectors. It is also noteworthy that none of the companies and (as far as the papers disclose) none of the lawyers involved were British, which answers the oft-repeated *canard* that it is only British lawyers who object to the beneficent practices of continental bureaucracy. But perhaps it may be relevant that Germany, Spain, France, and Belgium have written constitutions, while

out of the thirty-seven chapters of Magna Carta at least twenty-three have become obsolete, or have been abolished by later legislation, while among the fourteen which are not definitely extinguished there are at least as many for the benefit of the Crown as for the benefit of the subject, and the remainder have only a precarious existence, if any.¹¹⁶

1. The *Hoechst* and *Dow* Cases

Although the cases on article 14 of Regulation 17 should logically be considered after those on article 11, *Hoechst* was decided first, and its analysis set the pattern for the later cases. In a long opinion, Advocate General Mischo began by considering the nature of the Commission's task and the purpose of the powers conferred.¹¹⁷ He pointed out that it is in the nature of a competition investigation that the investigators do not

88, ("Orkem and Solvay") (Consolidated Opinion of Advocate General Darmon, May 18, 1989).

115. *National Panasonic v. Commission*, Case 136/79, 1980 E.C.R. 2033, 2068, Common Mkt. Rep. (CCH) ¶ 8682, at 8074 (Opinion of Advocate General Warner).

116. *Rex v. Haddock* (Lugg, J.), reported in A.P. HERBERT, UNCOMMON LAW 53, 54 (1969 ed.).

117. *Hoechst and Dow*, at 5-22, ¶¶ 11-49 (Opinion of Advocate General Mischo, Feb. 21, 1989).

know precisely what they are looking for, and still less, where they are likely to find it, since "evidence of illegal agreements . . . may be found in *feuilles volantes* often in manuscript, such as notes taken at secret meetings held away from business premises, sometimes in a hotel in a non-Member State, with abbreviations and coded references."¹¹⁸ So, it cannot be right that the Commission should be required to specify in advance what it is looking for. It also follows that it must have the wide powers of investigation that the terms of Regulation 17 provide.¹¹⁹

However, it does not follow that the Commission's inspectors have active powers of search. After a lengthy comparative study of the constitutional laws of the Member States, the Advocate General accepted the existence in Community law of a fundamental right to the inviolability of commercial premises, though not of the same intensity as in the case of a private home.¹²⁰ He then considered the terms both of national legislation and of article 8(2) of the European Convention and concluded that the powers conferred on the Commission did not *per se* violate any fundamental right even if backed by threats of financial penalties.¹²¹ But do the powers conferred extend, as the Commission claimed, to an active right of search, even in the teeth of objection by the undertaking under investigation?¹²²

Here the Advocate General found an elegant solution based on the terms of Regulation 17. Undertakings have a positive legal obligation to submit to investigation, to open files or filing cabinets when asked to do so, and to produce for inspection any documents that the Commission's investigators may ask to see. But if an undertaking refuses, then the Commission may have to rely on the national authorities to force it to do so.¹²³ Thus the Commission neither has, nor can claim, the type of powers for which a judicial warrant would be required under national law. If such powers are needed, they

118. *Id.* at 10, ¶ 22 (trans. by author).

119. See Regulation 17, *supra* note 62, art. 14, 5 J.O. at 209/62, O.J. Eng. Spec. Ed. 1959-62, at 91, Common Mkt. Rep. (CCH) ¶ 2531, at 1767-1771.

120. *Hoechst and Dow*, at 39-40, ¶¶ 103, 106 (Opinion).

121. *Id.* at 44, ¶ 116.

122. *Hoechst v. Commission*, Joined Cases 46/87 & 227/88, at 16-17, ¶ 37 (Judgment of Sept. 21, 1989); *Hoechst and Dow*, at 14, ¶ 31 (Opinion).

123. *Hoechst and Dow*, at 16-20, ¶¶ 38-43 (Opinion).

must be obtained by the appropriate national procedures, without, however, allowing the undertaking time to dispose of incriminating documents.¹²⁴

On the facts of *Hoechst* and *Dow* (where it was alleged that the inspectors had opened files without permission), the Advocate General concluded that there had been no breach of any fundamental right.¹²⁵ He distinguished between the decision ordering the investigation, which in his analysis, ordered nothing illegal, and the illegality of anything done by the inspectors which would invalidate the *result* of the investigation to the extent that documents illegally obtained were relied on to prove an infringement. There was, he held, no reliable evidence of illegal actions on the part of the inspectors.¹²⁶

The Court followed the Advocate General on all points. It remains to be seen whether the institutions will respond to his suggestion *obiter* that the European Court of Justice rather than the national courts should be empowered to issue judicial warrants, if required, for Commission searches.¹²⁷

2. The *Orkem* and *Solvay* Cases

Orkem and *Solvay* were concerned with the Commission's power under article 11 of Regulation 17 to require undertakings to provide information. Faced with a long list of questions which the Commission required them to answer, the companies invoked the privilege against self-incrimination relying on the laws of the Member States,¹²⁸ the European Convention,¹²⁹ and (a novelty) the International Covenant on Civil and Political Rights (the "International Covenant" or the "Covenant").¹³⁰

124. *Id.* at 21, ¶ 45.

125. *Id.* at 52, ¶ 140.

126. *Id.* at 48-52, ¶¶ 129-40.

127. *Id.* at 52-58, ¶¶ 141-54 (Opinion). There is a hint in the *Hoechst* and *Dow* judgments that the Court may consider itself to have this power already. See *Hoechst*, at 10, ¶ 19 (Judgment); *Dow Chemical Ibérica v. Commission*, Joined Cases 97-99/87, at 9, ¶ 16 (Judgment of Oct. 17, 1989), 1989 E.C.R. ____.

128. *Orkem and Solvay*, at 59-60, ¶¶ 97-98 (Opinion).

129. *Id.* at 59, 78, ¶¶ 96, 130; see European Convention, *supra* note 9, art. 6, 213 U.N.T.S. 221, 228.

130. *Orkem and Solvay*, at 59, ¶ 96; see International Covenant on Political and Civil Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter International Covenant].

The questions were set out under six headings including: (1) meetings of producers;¹³¹ (2) target prices or minimum prices;¹³² and (3) quotas, targets, or market sharing between producers of PVC.¹³³

Advocate General Darmon had no difficulty in accepting that there is, in the laws of the Member States, a common principle establishing the right not to be required to testify against oneself.¹³⁴ But he found that "this principle becomes less and less common as one gets away from . . . classical criminal procedure."¹³⁵

He then went on to analyze the national laws relating to the privilege of commercial undertakings. He concluded that

131. *Orkem*, at 14-15, ¶ 37 (Judgment); *Solvay*, at 13, ¶ 34 (Judgment). The relevant questions were:

- (1) Please list the date and place of all meetings of PVC producers since 1st January 1976 (even if you dispute the nature, subject matter or purpose of these meetings); or
- (2) Please indicate the meeting(s) at which your company participated, as well as the name and position in your company of your representative.

Orkem, at 2-3 (Hearings) (trans. by author). For a discussion of the significance of these questions, see text accompanying *infra* notes 144-52.

132. *Orkem*, at 15, ¶ 38 (Judgment); *Solvay*, at 13, ¶ 35 (Judgment). The relevant questions on target and minimum prices were:

Please give, for the period between 1st January 1976 and the present, details of each "initiative" on prices in the Western European market, which may have been discussed, proposed, contemplated or approved by those taking part in the meetings, in particular

- (a) the date of its entry into force
- (b) in table form, the target or minimum price for each quality, expressed in each national currency;
- (c) any concerted step or action which may have been considered or decided on to underpin these initiatives on prices;
- (d) any action which may have been taken to hold up or modify the initiative in question.

Orkem, at 4 (Hearings) (trans. by author) (emphasis added). For a discussion of the significance of these questions, see text accompanying *infra* notes 144-52.

133. *Orkem*, at 15-16, ¶ 39 (Judgment); *Solvay*, at 13-14, ¶ 36 (Judgment). The relevant questions concerning quotas, targets, and market sharing were:

- (1) Please state, for each year between 1976 (inclusive) and the present, the details of any system or method enabling sales targets or quotas to be assigned to those taking part and indicate any change or modification introduced from time to time.
- (2) Please describe any method of checking each year compliance with any system of volume targets or quotas and indicate how any departure from such targets or quotas could be corrected.

Orkem, at 5 (Hearings) (trans. by author) (emphasis added). For a discussion of the significance of these questions, see text accompanying *infra* notes 144-52.

134. *Orkem and Solvay*, at 60-68, ¶¶ 98-111 (Opinion).

135. *Id.* at 60, ¶ 98 (trans. by author).

there would again be no problem in finding a common principle in the classical field of criminal law, but the position was considerably less clear in the field of competition investigations: three or perhaps four Member States recognize no privilege for commercial undertakings; the position of two is purely conjectural; others distinguish between the phase of investigation and the phase of "prosecution"; only two, Germany and Spain, offer general protection, while the United Kingdom recognizes the right of Parliament to derogate from such privilege as there is.¹³⁶

Against the background of "this mosaic of national solutions," the Advocate General discussed the approach of the Court with particular reference to *A M & S*¹³⁷ and concluded that he could not derive from the laws of the Member States a general principle of Community law recognizing a privilege in favor of commercial undertakings at the stage of investigation, whatever might be the situation after delivery of a statement of objections and the start of formal proceedings.¹³⁸ He then looked at the International Covenant and the European Convention. The International Covenant explicitly recognizes the right "not to be forced to give evidence against oneself or to confess one's guilt."¹³⁹ The Advocate General observed that the Court had not previously looked at the Covenant and—significantly—wondered whether it might be important that Greece has not yet ratified it.¹⁴⁰ However, he concluded that the Covenant is in any event irrelevant since it is only concerned with the rights of human beings.¹⁴¹

The European Convention contains no express protection against self-incrimination but the European Court of Human Rights has given an extensive interpretation to article 6, the guarantee of a fair trial.¹⁴² The Advocate General found no compelling case law of the European Court of Human Rights or the Commission of Human Rights but added, again signifi-

136. *Id.* at 60-69, ¶¶ 97-117.

137. Case 155/79, 1982 E.C.R. 1575, Common Mkt. Rep. (CCH) ¶ 8757; see text accompanying *supra* notes 80-97.

138. *Orkem and Solvay*, at 75, ¶ 123 (Opinion).

139. International Covenant, *supra* note 130, art. 14(3)(g), 999 U.N.T.S. 171, 177.

140. *Orkem and Solvay*, at 76, ¶ 127 (Opinion).

141. *Id.*

142. See *Öztürk v. Germany*, 73 Eur. Ct. H.R. 3, 17-21 (ser. A) (1984).

cantly, that the European Court should not in any event feel itself bound by the decisions of the European Court of Human Rights. In the result, the Advocate General found that there had been no breach of any fundamental right.¹⁴³

The European Court approached the problem rather differently. It began by holding that Regulation 17 gives no right to silence, but rather, requires active cooperation on the part of the undertakings concerned, even if this involves providing evidence of breach of the competition rules.¹⁴⁴ National law provides no basis for a general privilege against self-incrimination in favor of legal persons in the field of economic law.¹⁴⁵ The European Court held that article 6 of the European Convention "may be invoked by an undertaking subject to investigation under competition law, [but] . . . neither its terms nor the case law of the European Court of Human Rights establish that [Article 6] recognises the right not to give evidence against oneself."¹⁴⁶ Moreover, the Court found that the International Covenant protects only those who are charged with a criminal offense in the context of judicial proceedings.¹⁴⁷

While these conclusions are stated with almost telegraphic brevity, it may be significant that national law, the European Convention, the decisions of the European Court of Human Rights, and the International Covenant are treated as parallel sources of applicable Community law. But too much should not be read into this because no positive conclusion was drawn from any one of them.

The surprise in the *Orkem* and *Solvay* judgments comes after the conclusion that there is no general principle of a right to silence or privilege against self-incrimination.¹⁴⁸ Having reached that conclusion the Court goes on to state that "[n]evertheless we must see whether some limits on the Commission's powers of investigation during the preliminary inquiry do not flow from the need to secure respect for the rights of defence which the Court has considered to be a fundamen-

143. *Orkem and Solvay*, at 90, ¶¶ 148-49 (Opinion).

144. *Orkem*, at 11-12, ¶ 27 (Judgment); *Solvay*, at 10, ¶ 24 (Judgment).

145. *Orkem*, at 12, ¶ 29 (Judgment); *Solvay*, at 10-11, ¶ 26 (Judgment).

146. *Orkem*, at 12-13, ¶ 30 (Judgment); *Solvay*, at 11, ¶ 27 (Judgment).

147. *Orkem*, at 13, ¶ 31 (Judgment); *Solvay*, at 11, ¶ 28 (Judgment).

148. *Orkem*, at 12-13, ¶ 30 (Judgment); *Solvay*, at 11, ¶ 27 (Judgment).

tal principle of the Community legal order.”¹⁴⁹

Referring back to its *Hoechst* judgment, the Court recognized that the rights of defense must not be prejudiced by anything done in the preliminary stages of a competition inquiry. So the Court distinguished between the right of the Commission “to oblige an undertaking to provide all necessary information as to facts known to it and, where necessary, to produce any relevant documents in its possession, even if these may help to establish anti-competitive behaviour on the part of that or another undertaking”¹⁵⁰ and, on the other, a right “to oblige an undertaking to provide answers which would require it to admit the existence of an infraction which it is up to the Commission to prove.”¹⁵¹

Put very shortly, the Court held that the Commission can ask for facts and documents but cannot require companies to answer leading questions. On this basis, the Court held that certain of the questions put to *Orkem* and *Solvay* were objectionable and, consequently, that the Commission’s decision requiring *Orkem* and *Solvay* to answer them was annulled.¹⁵²

It is too early to assess the full significance of the decisions in *Hoechst*, *Dow*, *Orkem*, and *Solvay*. But looking as a whole at the cases discussed above it seems reasonable to infer that the Court is more impressed by arguments that allow a balance to be struck between the effective enforcement of competition law and elementary fairness of procedure than by appeals to unassailable and all-embracing “constitutional” rights. The three cases in which the Court struck down Commission decisions all turned upon a detailed and discriminating distinction being drawn among specific documents (*A M & S*) or questions (*Orkem* and *Solvay*). The general principle of “rights of defense” on which the Court relied seems, therefore, to belong to the family of flexible but universal principles discussed below.

149. *Orkem*, at 13 ¶ 32 (Judgment); *Solvay*, at 11, ¶ 29 (Judgment) (citing *Micheilin v. Commission*, Case 322/81, 1983 E.C.R. 3461, 3498, ¶ 7, Common Mkt. Rep. (CCH) ¶ 14,031, at 14,512). This is now the Court’s standard reference on “rights of defense” as a general principle of Community law.

150. *Orkem*, at 14, ¶ 34 (Judgment); *Solvay*, at 12, ¶ 31 (Judgment).

151. *Orkem*, at 14, ¶ 35 (Judgment); *Solvay*, at 12, ¶ 31 (Judgment).

152. *Orkem*, at 16, ¶ 42 (Judgment); *Solvay*, at 14, ¶ 38 (Judgment). The objectionable questions are printed in italics at *supra* notes 131-33.

III. GENERAL PRINCIPLES OF INTERPRETATION AND APPLICATION

A. Legal Certainty

The principle of legal certainty means that the application of the law to a given situation must be predictable. It was invoked by the applicants in the *Quinine*¹⁵³ and *Dyestuffs*¹⁵⁴ cases on the ground that the Commission had delayed excessively in imposing fines for violations of Article 85.¹⁵⁵ The Court held that it could not create what would amount to a statute of limitations: indeed, the principle of legal certainty required that limitation periods must be fixed in advance by the Community legislature.¹⁵⁶ But the Court indicated that undue delay might bar (estop) the Commission from imposing a fine.¹⁵⁷ Limitation periods were fixed shortly thereafter.¹⁵⁸

The principle of legal certainty has been invoked more extensively by the European Court to cope with a series of problems relating to the interpretation and interaction of the principal EEC Treaty provisions, Articles 85 to 89. Article 85(2) provides in unqualified terms that "[a]ny agreements or decisions prohibited pursuant to this Article shall be automatically void."¹⁵⁹ Article 85(3) goes on to provide that the provisions of Article 85(1) "may be declared inapplicable,"¹⁶⁰ but it does not fully explain how the possibility of such a declaration

153. *ACF Chemiefarma v. Commission*, Case 41/69, 1970 E.C.R. 661, Common Mkt. Rep. (CCH) ¶ 8083.

154. *Dyestuffs* is actually comprised of three cases: (1) *ICI v. Commission*, Case 48/69, 1972 E.C.R. 619, Common Mkt. Rep. (CCH) ¶ 8161; (2) *Geigy v. Commission*, Case 52/69, 1972 E.C.R. 787, Common Mkt. Rep. (CCH) ¶ 8164; (3) *Sandoz v. Commission*, Case 53/69, 1972 E.C.R. 845, Common Mkt. Rep. (CCH) ¶ 8165.

155. *ACF Chemiefarma*, 1970 E.C.R. at 721 (Opinion of Advocate General Gand); *ICI*, 1972 E.C.R. at 702, Common Mkt. Rep. (CCH) ¶ 8161, at 8062; see EEC Treaty, *supra* note 8, art. 85.

156. *Sandoz*, 1972 E.C.R. at 849, Common Mkt. Rep. (CCH) ¶ 8165, at 8173 (referencing *Geigy*, 1972 E.C.R. at 826, ¶ 21); *Geigy*, 1972 E.C.R. at 826, ¶ 21, Common Mkt. Rep. (CCH) ¶ 8164, at 8138; *ICI*, 1972 E.C.R. at 653, ¶¶ 47, 49, Common Mkt. Rep. (CCH) ¶ 8161, at 8026.

157. *Sandoz*, 1972 E.C.R. at 849, Common Mkt. Rep. (CCH) ¶ 8165, at 8173 (referencing *Geigy*, 1972 E.C.R. at 826, ¶ 21); *Geigy*, 1972 E.C.R. at 826, ¶ 21, Common Mkt. Rep. (CCH) ¶ 8164, at 8138; *ICI*, 1972 E.C.R. at 653, ¶¶ 47, 49, Common Mkt. Rep. (CCH) ¶ 8161, at 8026.

158. Council Regulation No. 2988/74, O.J. L 319/1 (1974).

159. EEC Treaty, *supra* note 8, art. 85(1).

160. *Id.* art. 85(3).

fits with automatic nullity. If an agreement falls within the terms of Article 85(1), is it void until declared valid, or valid until declared void?

The question arose first in relation to "old agreements," that is, agreements already in existence when Regulation 17 came into force, making notification of an agreement to the Commission an essential precondition for exemption under Article 85(3). The Court interpreted Article 85 and Regulation 17 in such a way as to ensure that such agreements would have "provisional validity" until they were expressly declared both to come within Article 85(1) and to be ineligible for exemption under Article 85(3).¹⁶¹

The Court similarly applied the principle of legal certainty to cope with the situation where an agreement had been notified to the Commission and exemption under Article 85(3) had been applied for, but not yet granted.¹⁶² Again, the Court held that such agreements must have provisional validity.

On the face of it, the Court's reasoning applied equally to "old" and "new" agreements. But it subsequently became ap-

161. *De Geus v. Bosch*, Case 13/61, 1962 E.C.R. 45, Common Mkt. Rep. (CCH) ¶ 8003. In *De Geus*, the Court held that

[t]he opposite interpretation would lead to the inadmissible result that some agreements would already have been automatically void for several years without having been so declared by any authority, and even though they might ultimately be validated subsequently with retroactive effect. In general it would be contrary to the general principle of legal certainty - a rule of law to be upheld in the application of the Treaty - to render agreements automatically void before it is even possible to tell which are the agreements to which Article 85 as a whole applies.

Id. at 52, Common Mkt. Rep. (CCH) ¶ 8003, at 7138.

162. *Portelange v. Marchant*, Case 10/69, 1969 E.C.R. 309, Common Mkt. Rep. (CCH) ¶ 8075. In *Portelange*, the Court held that

in the absence of an explicit finding that the individual agreement in question not only contains all the factors mentioned in Article 85(1), but does not qualify for the exemption provided by Article 85(3) . . . [e]very agreement duly notified must be considered valid. . . . [I]t would be contrary to the general principle of legal certainty to conclude that, because agreements notified are not finally valid so long as the Commission has made no decision on them under Article 85(3) of the Treaty, they are not completely efficacious. Although the fact that such agreements are fully valid may possibly give rise to practical disadvantages, the difficulties which might arise from uncertainty in legal relationships based on the agreements notified would be still more harmful.

Id. at 316, ¶¶ 13-16, Common Mkt. Rep. (CCH) ¶ 8075, at 8095; see *Bilger v. Jehle*, Case 43/69, 1970 E.C.R. 127, Common Mkt. Rep. (CCH) ¶ 8076; *Rochas v. Bitsch*, Case 1/70, 1970 E.C.R. 515, Common Mkt. Rep. (CCH) ¶ 8102.

parent that this would have the paradoxical result of turning Article 85 upside down, since it would confer provisional validity on all notified agreements, even if manifestly illegal, and would exclude the jurisdiction of the national courts to declare them void under Article 85(2). Victims of illegal agreements must have an effective remedy. But parties to bona fide agreements must also know where they stand, and the delays in processing applications for exemption were already considerable. The Court reconciled these conflicting considerations in this way:

In the case of old agreements, the general principle of contractual certainty requires, particularly when the agreement has been notified in accordance with the provisions of Regulation No. 17, that the [national] court may only declare it to be automatically void after the Commission has taken a decision by virtue of that Regulation. In the case of new agreements, as the Regulation assumes that so long as the Commission has not taken a decision the agreement can only be implemented at the parties' own risk, it follows that notifications in accordance with Article 4(1) of Regulation No. 17 do not have suspensive effect. Whilst the principle of legal certainty requires that, in applying the prohibitions of Article 85, the sometimes considerable delays by the Commission in exercising its powers should be taken into account, this cannot, however, absolve the [national] court from the obligation of deciding on the claims of interested parties who invoke the automatic nullity. In such a case it devolves on the [national] court to judge, subject to the possible application of Article 177, whether there is cause to suspend proceedings in order to allow the parties to obtain the Commission's standpoint, unless it establishes either that the agreement does not have any perceptible effect on competition or trade between Member States or that there is no doubt that the agreement is incompatible with Article 85. Whilst these considerations refer particularly to agreements which must be notified in accordance with Article 4 of the Regulation, they apply equally to agreements exempted from notification, such exemption merely constituting an inconclusive indication that the agreements referred to are generally less harmful to the smooth functioning of the Com[m]on Market.¹⁶³

163. *Brasserie de Haecht v. Wilkin-Janssen* ("Haecht II"), Case 48/72, 1973

The increasing delays on the part of the Commission in issuing decisions on applications for exemption led to the practice of issuing "comfort letters"¹⁶⁴ a classic example of legal uncertainty. In the *Perfume* cases¹⁶⁵ the Court answered a series of questions from national courts on the legal effect of such letters in which the Commission used this formula or a variant of it: "there is no longer any need, on the basis of the facts known to it, for the Commission to take action under the Article 85(1) and the file may therefore be closed."¹⁶⁶ The European Court had to deal with two questions. First, what effect did a comfort letter have on the provisional validity of "old" agreements?¹⁶⁷ Second, did such a letter amount to an exemption under Article 85(3) and, if not, what was its effect vis-à-vis automatic nullity under Article 85(2)?

In answering these questions, the Court retraced its steps to the basic position that paragraphs one and two of Article 85 confer rights which can be enforced in the national courts.¹⁶⁸ The Court pointed out that while it may be appropriate for national courts to suspend proceedings so long as the Commission has not decided on an application for exemption, this

E.C.R. 77, 86-87, ¶¶ 9-13, Common Mkt. Rep. (CCH) ¶ 8170, at 8270; *see De Bloos v. Bouyer*, Case 59/77, 1977 E.C.R. 2359, 2369, ¶ 8, Common Mkt. Rep. (CCH) ¶ 8444, at 8031.

164. A comfort letter is a written declaration, usually signed by a director or other high level official within the Directorate-General for Competition for the Commission, that states a particular agreement presents no problem in terms of the competition rules. *See C.S. KERSE, supra* note 7, at 193, § 6.54.

165. The *Perfume* cases are: *L'Oréal v. De Nieuwe AMCK*, Case 31/80, 1980 E.C.R. 3775, Common Mkt. Rep. (CCH) ¶ 8715; *Lancôme v. Etos*, Case 99/79, 1980 E.C.R. 2511, Common Mkt. Rep. (CCH) ¶ 8714; *Marty v. Lauder*, Case 37/79, 1980 E.C.R. 2481, Common Mkt. Rep. (CCH) ¶ 8713; *Procureur de la République v. Giry and Guerlain*, Joined Cases 253/78 & 1-3/79, 1980 E.C.R. 2327, Common Mkt. Rep. (CCH) ¶ 8712.

166. *See L'Oréal v. De Nieuwe AMCK*, 1980 E.C.R. at 3789, ¶ 10, Common Mkt. Rep. (CCH) ¶ 8715, at 8606; *Lancôme v. Etos*, 1980 E.C.R. at 2533, ¶ 10, Common Mkt. Rep. (CCH) ¶ 8714, at 8592; *Marty v. Lauder*, 1980 E.C.R. at 2499, ¶ 9, Common Mkt. Rep. (CCH) ¶ 8713, at 8572; *Procureur de la République v. Giry and Guerlain*, 1980 E.C.R. 2374, ¶ 12, Common Mkt. Rep. (CCH) ¶ 8712, at 8543.

167. This question arose only in the *Lancôme* case. 1980 E.C.R. at 2532, ¶ 6, Common Mkt. Rep. (CCH) ¶ 8714, at 8591.

168. *L'Oréal v. De Nieuwe AMCK*, 1980 E.C.R. at 3792, ¶ 20, Common Mkt. Rep. (CCH) ¶ 8715, at 8607-8608; *Lancôme*, 1980 E.C.R. at 2537, ¶ 25, Common Mkt. Rep. (CCH) ¶ 8714, at 8594; *Marty v. Lauder*, 1980 E.C.R. at 2501, ¶¶ 13-16, Common Mkt. Rep. (CCH) ¶ 8713, at 8572-8573; *Procureur de la République v. Giry and Guerlain*, 1980 E.C.R. at 2375, ¶ 18, Common Mkt. Rep. (CCH) ¶ 8712, at 8543.

can hardly be so when the Commission has issued a letter stating that it proposes to close the file. Consequently, the issuing of a comfort letter has the effect of fully restoring the jurisdiction of the national courts to decide whether an agreement infringes Article 85(1) and is therefore unenforceable under Article 85(2). In deciding this question, the comfort letter is not binding on the national courts but merely constitutes an element of fact that the national courts may take into account in reaching their decision.¹⁶⁹

The problem of automatic nullity came full circle in *Ministère Public v. Asjes* ("Nouvelles Frontières"),¹⁷⁰ a case concerning air transport tariffs. In *De Geus v. Bosch* the notion of provisional validity was invoked to avoid the automatic nullity of "old" agreements.¹⁷¹ In *Nouvelles Frontières*, the question arose in relation to agreements to which Regulation 17 did not apply at all. Council Regulation 141/62¹⁷² exempted transport from the application of Regulation 17. The Council subsequently adopted rules for transport by rail, road, and inland waterway,¹⁷³ but air transport remained exempt. Nevertheless, Article 88 of the EEC Treaty provides that, in the absence of Community legislation,

the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and of Article 86.¹⁷⁴

Under French law, air transport could only be provided by undertakings approved by the Ministry of Civil Aviation and at

169. *L'Oréal v. De Nieuwe AMCK*, 1980 E.C.R. at 3789-90, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8715, at 8607; *Lancôme v. Etos*, 1980 E.C.R. at 2533, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8714, at 8592; *Marty v. Lauder*, 1980 E.C.R. at 2499, ¶ 10, Common Mkt. Rep. (CCH) ¶ 8713, at 8572; *Procureur de la République v. Giry and Guerlain*, 1980 E.C.R. at 2374, ¶ 13, Common Mkt. Rep. (CCH) ¶ 8712, at 8543.

170. Joined Cases 209-213/84, 1986 E.C.R. 1425, Common Mkt. Rep. (CCH) ¶ 14,287.

171. Case 13/61, 1962 E.C.R. 45, 52-53, Common Mkt. Rep. (CCH) ¶ 8003, at 7139.

172. Council Regulation No. 141/62, 5 J.O. 2751/62 (1962).

173. Council Regulation No. 1017/68, 11 J.O. L 175/1 (1968), Common Mkt. Rep. (CCH) ¶ 2815.

174. EEC Treaty, *supra* note 8, art. 88.

tariffs also approved by the Ministry.¹⁷⁵ The defendants in the national proceedings were prosecuted under the Civil Aviation Code for selling air tickets at prices below the approved tariffs. The French Court asked the European Court whether the provisions of the French Code were compatible with Community law.¹⁷⁶ The underlying question was whether the various agreements and concerted practices by which air tariffs were fixed constituted a breach of Article 85. If so, were the tariffs unenforceable, thus rendering the prosecutions illegal under Community law? Needless to say, the case raised issues of considerable political delicacy and interest.

In the event, the Court resolved the problem by restating the solution in *De Geus v. Bosch*,¹⁷⁷ that it would be contrary to the principle of legal certainty that agreements should be prohibited and rendered automatically void before it can be ascertained whether Article 85 applies to them.¹⁷⁸ In the present case, since Regulation 17 did not apply to air transport, such a decision could only be made by "the authorities in the Member States" and they had, *ex hypothesi*, taken no such decision.¹⁷⁹ Consequently, national courts had to accept the provisional validity of the agreements.

The anticompetitive effect of this conclusion was mitigated by the Court reiterating that Member States are bound by the EEC Treaty not to adopt or to maintain in force any measure which could deprive Articles 85 and 86 of their effectiveness. This approach, which could itself be described as "constitutional" because it concerns the obligations of Member States under the Treaty, is particularly significant since it emphasizes a point made earlier in this paper, that "the whole treaty is really about competition." The "Rules on Competition" are "Common Rules"¹⁸⁰ and are *complementary* to the "Four Free-

175. *Nouvelles Frontières*, 1986 E.C.R. at 1427, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,781 (Opinion of Advocate General Lenz).

176. *Id.* at 1428-29, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,782.

177. Case 13/61, 1962 E.C.R. 45, Common Mkt. Rep. (CCH) ¶ 8003.

178. *Nouvelles Frontières*, 1986 E.C.R. at 1426-27, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,779.

179. *See id.* at 1469-70, ¶¶ 65-67, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,779-16,780. The Commission had not made, as it could have done under Article 89, a finding that the tariff agreements infringed Article 85. *Id.* at 1468, ¶ 59, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,779.

180. *See* EEC Treaty, *supra* note 8, arts. 85-94.

doms" (freedom of movement of goods, persons, services, and capital) that constitute the "Foundations of the Community."¹⁸¹ Competition is, so to speak, the fifth wheel on the chariot of free movement. In this sense, the very notion of cross-frontier competition is of constitutional importance.

B. *Legitimate Expectation*

Closely related to the principle of legal certainty is that of legitimate expectation: that is, a person is entitled to act (and conduct his business) with the reasonable expectation that the law, as currently applied, will continue to be applied in the same way. This principle was invoked in a case where fines were imposed on a number of Belgian companies and trade associations with respect to an agreement about conformity checks for imported washing-machines and dishwashers.¹⁸² The effect of the agreement was to make it impossible for importers other than sole importers, to obtain conformity checks, so excluding parallel imports.

The agreement had not been notified because the parties took the (rather implausible) view that it fell within article 4(2) of Regulation 17, which exempts agreements where "the only parties thereto are undertakings from one Member State and the agreements do not relate either to imports or to exports between Member States."¹⁸³

The Commission rejected this contention and refused to grant exemption under Article 85(3) on the ground that the agreement had not been notified.¹⁸⁴ The Court supported the Commission on this point. However, it then had to address the applicant's further contention that the parties to the agreement ought not to have been fined because the Commission had given the impression that no fines could be imposed with respect to agreements exempt from the requirement of notification.¹⁸⁵ It is not altogether clear from the report how the

181. *Id.* arts. 9-37.

182. *IAZ v. Commission*, Joined Cases 96-102, 104-05, 108 & 110/82, 1983 E.C.R. 3369, Common Mkt. Rep. (CCH) ¶ 14,023.

183. Regulation 17, *supra* note 62, art. 4(2), 5 J.O. at 206/62, O.J. Eng. Spec. Ed. 1959-62, at 88, Common Mkt. Rep. (CCH) ¶ 2431, at 1737.

184. *IAZ*, 1983 E.C.R. at 3412, ¶ 31, Common Mkt. Rep. (CCH) ¶ 14,023, at 14,364.

185. *Id.* at 3413, ¶ 33, Common Mkt. Rep. (CCH) ¶ 14,023, at 14,375.

Commission could be said to have given such an impression. However, the Court rejected the contention on the simpler ground that the agreement was not exempt from notification.¹⁸⁶

That case appears to be the only competition case in which the principle of legitimate expectation, as such, was invoked as a ground for annulling a Commission decision. But like many such principles it overlaps with others such as the principle of estoppel (*scotticé* personal bar) formulated by Advocate General Warner who observed:

[T]here emerges a general principle (applicable to a public authority except where that would be irreconcilable with its public duty) that one who, having legal relations with another, by his conduct misleads that other as to a material fact (including the existence of a right) cannot thereafter base on that fact a claim against him if he (that other) has acted in a relevant way in reliance on what he was lead by that conduct to believe.¹⁸⁷

An argument along these lines might be available if, for example, the Commission reopened the file after issuing a comfort letter without having any fresh facts before it.

C. Proportionality

The principle of proportionality is perhaps applied more frequently by the Court than any other principle, but not very often in competition cases. The principle is that the means employed must be proportionate to the ends to be achieved. It is an essential aspect of the German insistence that administrative action must not be excessive or arbitrary. This principle was invoked in *National Panasonic v. Commission*¹⁸⁸ but can be best illustrated by the Court's approach in assessing the level of fines in both *Pioneer*¹⁸⁹ and *Hasselblad v. Commission*.¹⁹⁰

According to the Commission, *Pioneer* was a crucial test case for the competition policy of the Community, the real is-

186. *Id.* at 3413, ¶ 34, Common Mkt. Rep. (CCH) ¶ 14,023, at 14,375.

187. *Boizard v. Commission*, Joined Cases 63 & 64/79, 1980 E.C.R. 2975, 3002.

188. Case 136/79, 1980 E.C.R. 2033, Common Mkt. Rep. (CCH) ¶ 8682; *see supra* notes 68-79 and accompanying text.

189. *Musique Diffusion Française v. Commission* ("Pioneer"), Joined Cases 100-03/80, 1983 E.C.R. 1825, Common Mkt. Rep. (CCH) ¶ 8880.

190. Case 86/82, 1984 E.C.R. 883, Common Mkt. Rep. (CCH) ¶ 14,014.

sue being the amount of the fines imposed.¹⁹¹ Under article 15(2) of Regulation 17, the Commission may by decision impose on undertakings "fines of from 1,000 to 1,000,000 units of account or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement."¹⁹²

Until the late 1970s, the Commission had never imposed a fine greater than 2% of turnover¹⁹³ and the existence of what was almost a tariff for competition infringements led some businessmen to make a cold assessment of whether it was financially worthwhile to break the law. The Commission decided on a "get tough" policy. The first to feel its impact were Pioneer's European subsidiary and its French, German, and British distributors which had got together to prevent parallel imports from Germany and Britain into France. Fines amounting to 3% to 4% of turnover were imposed and were vigorously contested before the Court.¹⁹⁴

It was argued by the applicants that the imposition of fines at an unprecedentedly high level, without advance warning, was retroactive, arbitrary, and disproportionate.¹⁹⁵ Pioneer also argued that fines based on turnover should be based on the corporation's turnover in the relevant market rather than on total turnover. The fine imposed on the German distributor amounted to 18% of its turnover in the relevant market (hi-fi equipment) which had never been more than 10% of its total turnover.

Both the Court and the Advocate General held that the words and the intention of article 15(2) were clear. The Court, in its opinion, stated that "the [percentage] limit seeks to prevent fines from being disproportionate in relation to the size of the undertaking and, since only the total turnover can effectively give an approximate indication of that size, the aforementioned percentage must . . . be understood as referring to

191. *Pioneer*, 1983 E.C.R. at 1946, Common Mkt. Rep. (CCH) ¶ 8880, at 8419 (Opinion of Advocate General Slynn).

192. Regulation 17, *supra* note 62, art. 15(2), 5 J.O. at 209/62, O.J. Eng. Spec. Ed. 1959-62, at 91-92, Common Mkt. Rep. (CCH) ¶ 2541, at 1771.

193. *Pioneer*, 1983 E.C.R. at 1905, ¶¶ 103-04, Common Mkt. Rep. (CCH) ¶ 8880, at 8396.

194. *Id.* at 1946, Common Mkt. Rep. (CCH) ¶ 8880, at 8419.

195. *Id.*

the total turnover.”¹⁹⁶ The Advocate General thought that “when increasing the fines some regard should be had to the level of fines imposed in the past.”¹⁹⁷

But the Court stated that “the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.”¹⁹⁸ However, the Court also held that the fine imposed in a given case must not be arbitrary or disproportionate.¹⁹⁹

In the event, the fines were reduced substantially, in part because the Court held that the Commission had been wrong in relation to the duration of the infringement.²⁰⁰ In the case of the German distributor, which had complained that the mere imposition of the fine had endangered its credit position and that payment would endanger its very existence being equivalent to several years’ profits, the Court was even more lenient than the Advocate General had suggested.²⁰¹ But the Court pointed out that if, as the German distributor said, sales of hi-fi equipment only represented 10% of its turnover, it ought more easily to have resisted the pressure to take part in illegal activity.²⁰²

In *Hasselblad*, the result was very much the same in that the fine was halved on the ground that “the applicant is not a large

196. *Id.* at 1908, ¶ 119, Common Mkt. Rep. (CCH) ¶ 8880, at 8397.

197. *Id.* at 1947, Common Mkt. Rep. (CCH) ¶ 8880, at 8420 (Opinion of Advocate General Slynn).

198. *Id.* at 1906, ¶ 109, Common Mkt. Rep. (CCH) ¶ 8880, at 8396.

199. *Id.* at 1909, ¶ 121, Common Mkt. Rep. (CCH) ¶ 8880, at 8396-8397. The Court stated that

on the one hand, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors and, consequently, that the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover.

Id.

200. *Id.* at 1909-10, ¶¶ 123-24, Common Mkt. Rep. (CCH) ¶ 8880, at 8398.

201. *Compare id.* at 1909-10, Common Mkt. Rep. (CCH) ¶ 8880, at 8399 (Judgment) *with id.* at 1953, Common Mkt. Rep. (CCH) ¶ 8880, at 8424 (Opinion of Advocate General Slynn).

202. *Id.* at 1912, ¶ 134, Common Mkt. Rep. (CCH) ¶ 8880, at 8399.

undertaking.”²⁰³ But the Court reiterated that “[a]n undertaking’s turnover is only one of the factors which may be taken into account”²⁰⁴ and described Hasselblad’s refusal to supply as “a flagrant breach of the rules on competition contained in the Treaty.”²⁰⁵

CONCLUSION

If “rights of defense” are included in the same family as the general principles of law discussed in the last section, their day-to-day application is probably of greater importance in the development of Community competition law than more grandly stated issues of fundamental rights. Indeed, the number of competition cases in which the Court has sustained an argument based on fundamental rights is very small indeed. But *Hoechst* shows that it is not too late to bring out the big guns of constitutional artillery. It is perhaps ironical that it should be just at this moment that the front line battleground has been moved to the Court of First Instance.

203. *Hasselblad v. Commission*, Case 86/82, 1984 E.C.R. 883, 911, ¶ 57, Common Mkt. Rep. (CCH) ¶ 14,014, at 14,189.

204. *Id.* at 911, ¶ 57, Common Mkt. Rep. (CCH) ¶ 14,014, at 14,189.

205. *Id.*